IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.727 OF 1999

Kishor Eknath Nikam,
Age: 31 years, occup: Service,
R/o. Plot No.782, Near Datta
Mandir, I.T.I. Backside,
Pachgaon Road, Jagtap Nagar,
Dist. Kolhapur. Appellant
(original Accused No.2)

v/s.

The State of Maharashtra
(At the instance of Juna Rajwada
Police Station, Kolhapur). Respondent

Mr.A.P. Mundargi i/b. Mr.Ganesh Gole for the appellant.

Ms. U.V. Kejriwal, APP for the State.

ALONG WITH
CRIMINAL APPEAL NO. 130 OF 2000

Jagdish Prabhakar Babar,
age 31 years, R/o. Plot No.3.,
Mandlik Vasahat, Kolhapur,
District Kolhapur. (At present
in Kolhapur Central Prison, Kalamba). Appellant
(original Accused No.1.)

vs.

The State of Maharashtra
(at the instance of Senior Inspector
of Police, Juna Rajwada Police Station,
Kolhapur. Respondent
(original complainant)

Mr. A. S. Khandeparkar for the appellant.

Ms. U.V. Kejriwal, APP for the State.

CORAM : R. M. LODHA &
R. S. MOHITE,JJ.

DATED : 25th/27th January 2005

ORAL JUDGMENT (Per R.M. Lodha,J.):

Jagdish Prabhakar Babar (A1) and Kishor Ekanath Nikam (A2) have been convicted by the Additional Sessions Judge, Kolhapur for the offences punishable under Sections 302, 504, 506(2) read with Section 34 of the Indian Penal Code (IPC) and they had been sentenced to suffer life imprisonment and pay a fine of Rs.5,000/- and in default to suffer R.I. for six months for the offences punishable under Section 302 read with Section 34 of IPC. They have also been sentenced to suffer R.I. for three months each and pay a fine of Rs.500/- each and in default to suffer S.I. for six months for the offence punishable under Sections 504, 506(2) read with Section 34 of IPC. A1 has approached this Court by means of Criminal Appeal No.130/2000 and A2 has come up in appeal by means of Criminal Appeal No.727/1999. We heard both the appeals together and these appeals are being disposed of by us by this common judgment.

2. We shall first advert to the facts alleged and the sequence of events that occurred on 11.04.1998 as has emerged from the prosecution evidence.

3. On 11.04.1998, Mahendra Vishwasrao Ghatge (PW 1), Prashant (deceased) and one Uttam had their dinner at Maruti Hotel in Laxmipuri. After their dinner, they returned to Azad Chowk. PW 1 and Prashant sat on the steps in front of one shop styled as "Shanti Plywood"; Uttam had left the spot. Vijay Bapusaheb Piste (PW 2) and Bandu @ Vijay Dynandeo Gata (PW 3) were sitting inside one cement godown nearby. A1, A2 and Arun Hulswar (A3) came from the side of Ghate hospital. A1 was on scooter, while A2 and A3 were on bullet motorcycle. They proceeded towards Bindu chowk but immediately returned and stopped their vehicles on the side of the road. A1 called Prashant. Prashant went near him; some talks started between them that later turned into heated verbal altercation. PW 2 and PW 3 on hearing verbal altercation, came out of the godown. A1 took out the knife from the side of his waist and rushed towards Prashant to stab him. PW 2 and PW 3 pushed A1 back side. PW 1 then entered the godown to seek help. He found one electric tubelight and bamboo lying there and came out of the godown armed with them. By that time A1 and Prashant had reached near Audi Pan Shop. When PW 1 was about to reach there, A1 stabbed Prashant in his abdomen. A2 and A3 were sanding there. A2 showed his knife and asked PW 2 and PW 3 to stand aside. PW 1 gave a blow of tubelight on the head of A1 and a bamboo blow on the rear side of his head. PW 1 ran away

towards the side of Bindu chowk. PW 3 attempted to snatch knife from A2 and in that scuffle PW 3 sustained cut injury on the left hand middle finger. Prashant fell down on the ground. A1 gave about 5/6 knife blows on various parts of body of Prashant. Then all the three, A1, A2 and A3 ran away. PW 2 immediately gave the information of the incident at Juna Rajwada Police Station. Based on that First Information Report (Exh. 31) was registered. Investigation commenced; autopsy on the dead body of Prashant was conducted by Dr.G.D. Nalawade (PW 14); accused persons were arrested; medical examination of A1 was got done and the recovery of two knives (Article 14 and Article 16) was made at the instance of A1 and A2. On conclusion of the investigation, all the three accused persons were chargesheeted for the offences punishable under Sections 302, 504, 506(2) read with Section 34 of IPC and committed to the Court of Sessions, Kolhapur.

4. The accused persons pleaded not guilty and prayed for trial.

5. The prosecution in support of their case examined in addition to the abovereferred eye-witnesses PW 1, PW 2, PW 3, Sachin Suryakant Bhosale (PW 4), Shankar Sadashiv Kumbhar (PW 5), Ravindra Sadashiv Sutar (PW 6), Vinayak Shamrao Malkar (PW 7), Sunil Gopalrao Suryawanshi (PW

8), Jaywant Subhash Chavan (PW 9), Ramchandra Bhairu Adurkar (PW 10), Chandrakant Nilkanth Desai (PW 11), Nazir Ahamad Husain Kazi (PW 12), Dr.Rajashri Shailendra Mane (PW 13), Dr.G.R. Nalawade (PW 14), Ramchandra Bapuso Gavali (PW 15) and Prakash Dhundiraj Limaye (PW 16).

6. The evidence of the prosecution was put to the accused persons and the statement of the accused persons under Section 313 was recorded. A2 and A3 denied their involvement in the incident. A1 also denied denying the prosecution evidence and tendered his written say setting up his defence. His defence was that on 11.04.1998 at about 9 or 9.30 p.m. he was proceeding on his scooter from Uma Talkies towards Bindu Chowk. At Azad chowk Prashant (deceased) stopped his scooter. PW 1 and one other person were along with him. Prashant asked him if he (A1) had become impatient about money and then Prashant started threatening him. On this account, verbal altercation ensued between them. At that time Prashant, PW 1 and the third person started pushing him. In order to escape from them he went on the other side of the road. At that moment Prashant took out knife and stabbed him. He (A1) held his hand and knife hit his forehead. The other two persons started beating him with stick like weapon. Somehow he managed to escape from there and without bothering about

his scooter he went away from the spot. According to A1 Prashant must have injured in that incident.

7. The trial Court, after hearing the advocate for the accused persons and upon consideration of the evidence on record, gave benefit of doubt to A3 and acquitted him. However, as noticed above, A1 and A2 were convicted for the offences punishable under Section 302, 504, 506(2) read with Section 34 of the Indian Penal Code and sentenced giving rise to these two appeals.

8. We heard Mr.A.S. Khandeparkar, the learned counsel for A1 and Mr.A.P. Mundargi, the learned counsel for A2. We also heard the learned APP and perused the record.

9. The thrust of the argument of Mr.A.S.Khandeparkar, the learned counsel for A1 was that the incident had not occurred in a manner suggested by the prosecution and that the prosecution has suppressed the genesis and not come out with the true story. The learned counsel submitted that in a sudden fight between A1 and Prashant in which Prashant was aggressor, the incident occurred wherein A1 sustained injuries; the deceased may have also sustained some injuries for which A1 cannot be held guilty of committing murder of Prashant. Mr.Khandeparkar strenuously urged that there was no

pre-arranged plan. According to him, PW 2 and PW 3 were planted as witnesses; it is not probable that they would be sitting in the cement godown in the night at about 9/10 p.m. The learned counsel also pointed out that the version given by PW 1 was not reliable as his account was not consistent and probable. Alternatively, Mr.Khandeparkar contended that the injuries inflicted by A1 on the person of Prashant was in exercise of his right of private defence. When A1 saw PW 1 armed with tubelight and bamboo and he apprehended danger to his life that injuries may have been inflicted by A1 on Prashant.

10. Mr.A.P. Mundargi, the learned counsel for A2 adopted the submissions of Mr.A.S. Khandeparkar. He additionally submitted that the learned trial Judge was not justified in invoking Section 34 and convicting A2 for the offence punishable under Section 302 read with Section 34. He would urge that the prosecution evidence does not prove that there was common intention to kill Prashant. At best, according to him, from the available evidence, the common intention to cause grievous hurt on Prashant can be inferred and for the acts of A1, beyond that, A2 cannot be held responsible. In support of his contention he relied upon the Division Bench judgment of this Court in the case of Bhimashankar Siddannappa Thobade v. The State of Maharashtra, LXIX Bombay Law

Reporter 788.

11. The learned APP, on the other hand supported the judgment of the learned Additional Sessions Judge.

12. That the death of Prashant was homicidal is established by the deposition of PW 14. According to him, in the register entitled "Brought Death Register" the entry of deceased Prashant is effected against the date of 11.04.1998 at about 10.50 p.m. Post mortem of dead body of Prashant was conducted by him. It started at 2.30 a.m. (12.04.1998) and completed at 3.30 a.m. (12.04.1998). In all, the following ten injuries were found on the dead body:

"1. Abrasion over left cheak lateral to Rt. eye measuring about 2 x 1 cm.

2. Abrasion over forehead left side above left eye brow measuring about 2 x 4 cm.

3. Incised wound over left memory region at the level of 2nd intercostal space 2.5 cm x 1/2 cm. horizontal in direction depth-up to lung tissue. Clotted blood seen.

4. Incised wound at the level of 6th left intercostal space at interior axillary line measuring about 1.5 cm x. 1 cm. obliquely directed. Depth-upto lung tissue-clotted blood seen.

5. Incised wound over the chest left side at the mid axillary line measuring about 1.5 cm x 1 cm., 5 cm below the injury no.4. Clotted blood seen depth upto lungtissue.

6. Incised wound over the abdomen 5 cm above the umbilocus measuring about 3.5 cm. x 1 cm horizontal depth-peritoneal deep. Clotted blood seen approximately 6" in length.

7. Incised wound 2.5 cm. above the umbulocus just to left of middline measuring about 3.5 cm. x 1.5 cm. through which small intestine comes out. Wound is horizontal in direction. Clotted blood seen depth-peritoneal deep.

8. Incised wound over the middle of back of the level of L, in the midline measuring about 1.5 cm x 1 cm. Clotted blood is seen.- Depth muscle deep.

9. Incised wound over the back 4.5 cm. above and to the right side of the wound no.8 measuring about 1.5 cm. x 1 cm. Vertical in direction. Cloted blood is seen. Depth-Peritoneal deep.

10. Incised wound over the lateral aspect of left lower thigh 7.5 cm. above the left keen measuring about 3.5 cm x 1.5 cm. oblique in direction, clotted blood is seen, Depth muscle deep."

13. PW 14 stated in his evidence that all injuries were ante-mortem. Injury nos. 2,4,5,6,7 and 9 were grievous and sufficient to cause death in the ordinary course of nature. He clarified that the rupture of liver was the main cause of death. The evidence of PW 14 thus leaves no manner of doubt that the death of Prashant was neither natural nor accidental nor suicidal, but homicidal.

14. The question then arises who is responsible for the death of Prashant. The prosecution has produced direct

evidence by examining PW 1, PW 2 and PW 3. Since the learned counsel for the accused persons argued that the prosecution suppressed the genesis and has not come out with the true story, we scanned the evidence of PW 1, PW 2 and PW3 with great care and caution to satisfy ourselves whether they are worthy of faith and could be relied upon in respect of the account of the incident given by them. That the deceased and PW 1 were together on 11.04.1998 at about 9.30 p.m. at Azad chowk is not in dispute. PW 1 is the person who lodged the First Information Report immediately after the incident. He deposed that he and Prashant on 11.04.1998 at about 9.15 p.m. were sitting on the steps in front of Shanti Plywood. The accused persons came from the side of road of Ghate hospital and proceeded towards Bindu chowk but immediately returned; parked their vehicles on the side of the road. A1 called the deceased. The deceased went near him. Their talk after few minutes turned into heated exchange of words and abuses. He tried to intervene in the quarrel but A-1 told him, "do not interfere, I will deal with him". PW 2 and PW 3 who were sitting in the nearby cement godown came near them; A1 drew knife from the side of his waist and rushed towards Prashant. PW 2 and PW 3 pushed A1 back side and due to that no harm could be caused to Prashant. PW 2 then entered the godown to seek help nobody was found. He, however, picked up electric tubelight and bamboo

lying there and came out armed with them. By that time A1 and Prashant had reached near Audi Pan Shop. When he was to reach near A1, A1 stabbed Prashant on his abdomen. He then gave a blow of tubelight on the head of A1 and bamboo blow on the rear side of his head and then ran away. He deposed that A2 and other accused were standing near A1. PW 1 has been cross-examined at length but we find that his version inspires confidence. Minor omissions apart, PW 1 has withstood the incisive cross-examination. In his substantive evidence before the Court he did not depose about A2 being armed with knife - though in the First Information Report he said so. This omission pales into insignificance in the light of the account of the incident given by him which is also consistent with the deposition of PW 2 and PW 3. Deposition of this witness also finds support from the medical evidence.

15. We shall now advert to the deposition of PW 2 and PW 3. Their evidence is mainly criticised on the ground that there was no occasion for them to be present in the cement godown at an odd hour in the night. According to the learned counsel for the appellants, PW 2 and PW 3 had no concern with the cement godown and it was highly improbable that they would be chitchatting in the cement godown in the night. Have they been planted by the prosecution? Are they chance witnesses? We do not

think it is so. PW 2 and PW 3 have been cross-examined extensively, but nothing could be elicited by the defence that could create doubt that they were not sitting in the cement godown at about 9.30/9.45 p.m. on 11.04.1998. The deposition of both the witnesses is consistent that when they were sitting in the cement godown on the date of the incident , at about 9.45 p.m. they heard heated verbal altercation and abuses. They came out of the godown and found A-1 abusing the deceased. They saw A2 as well as PW 1 present at the place of incident. They saw A1 drawing knife from the side of his waist and rushing towards Prashant. They prevented A1 from stabbing Prashant by pushing him from back side. They claim to have seen PW 1 rushing towards godown and coming out with the tubelight and bamboo in his hand. According to them when PW 1 came out of the godown with tubelight and bamboo in his hand; A1 inflicted a knife blow on the abdomen of Prashant and then PW 1 giving blow on the skull of A1 by electric tubelight and one blow of bamboo on the back side of head. They also claim to have seen Prashant falling on the ground and A1 inflicting 5-6 knife blows on the Prashant. A2 who was armed with knife, asked them to stand aside. PW 3 deposed that when he tried to snatch knife from A2, he sustained injury on the middle finger of left hand. The evidence of PW 2 and PW 3 is not only consistent with each other, but is also consistent with

the evidence of PW 1. We find it unable to accept the submission of the learned counsel for the appellants that PW 2 and PW 3 are not eye-witnesses. Their presence at the time of occurrence of the incident is established. As a matter of fact, PW 3 sustained injury on the middle finger of his left hand when he tried to snatch the knife from A2. He was examined by PW 14 on 13.04.1998 and it was found that PW 3 had incised wound near over left middle finger in the middle 1/3rd measuring about 3 cam x 2 mm skin deep. His injury certificate is proved by PW 14 and that is marked as Exhibit 67. Nothing has come in the cross-examination that PW 2 and PW 3 had any ill-feeling against the accused A1 and A2 or the said witnesses had any enmity with A1 and A2.

16. It was contended by the learned counsel for the appellants that deposition of PW 1 as well as PW 2 and PW 3 is not corroborated by the evidence relating to recovery of knives. It is true that PW 1, PW 2 and PW 3 deposed before the Court that the big knife (Article 16) was used by A1 and the injuries on the person of Prashant were inflicted by the said knife (Article 16). From the deposition of PW 16 - the Investigating Officer, however, it transpires that the knife (Article 14) was recovered at the instance of A1 and the other knife (Article 16) was recovered at the instance of A2.

The panchanama (Exhibit 43) and the deposition of PW 8 also show that at the instance of A1, the knife (Article 14) was recovered. The deposition by PW 1, PW 2 and PW 3 that the big knife (Article 16) was used by A1 is nothing but a genuine mistake of identification of the knife. In our considered view, this discrepancy highlighted by the learned counsel for the appellants does not persuade us to discard the evidence of PW 1, PW 2 and PW 3.

17. The learned counsel for the appellants also highlighted that PW 1 in his substantive evidence before the Court has not stated that A2 was armed with any knife or that A-2 asked PW 2 and PW 3 to stand aside. It is true that PW 2 deposed that when in the beginning an attempt was made by A1 to stab Prashant with knife, they (PW 2 and PW 3) pushed him from back side; at that time A2 showed knife to them and asked them to stand aside while PW 3 stated that after the knife blow had been inflicted by the A1 on the abdomen of Prashant and Prashant had fallen on the ground, A1 gave 4/5 knife blows on the person of Prashant and at that time A2 asked them (PW 2 and PW 3) to stand aside. The fact that A2 was armed with knife is established beyond doubt by the deposition of PW 2 and PW 3 though PW 1 is silent about this aspect. PW 2 and PW 3 are also consistent that A2 showed his knife and asked them (PW 2 and PW 3)

to stand aside. Whether it was after the first incident when A1 tried to inflict knife blow on the person of Prashant and PW 2 and PW 3 intervened and saved Prashant that at that time A2 showed the knife to PW 2 and PW 3 and asked them to stand aside or it was after Prashant had fallen down on having received one stab injury by A1 and A1 further inflicted 4-5 injuries on the person of Prashant at that time A2 asked PW 2 and PW 3 to stand aside is only trivial inconsistency and does not lead us to disbelieve the deposition of PW 1, PW 2 and PW3.

18. We hold no doubt about the presence of PW 1, PW 2 and PW 3 at the place of the incident. Their ocular version is corroborated by medical evidence. It also finds support from spot panchanama (Exh. 39) which was drawn immediately. The fact that broken piece of tube and bamboo were found at the site further corroborates the presence of PW 1. Article 14 (knife) was recovered at the instance of A1 and was found to have blood stains. The blood group of the deceased was found to be of "A" group and the chemical analysis showed that the blood stains found on the knife (Article 14) were also of "A" group.

19. Mr.A.S.Khandeparkar, the learned counsel for A1 strenuously urged that incident occurred without premeditation and in sudden fight in the heat of passion

and since from the facts and circumstances of the case, it cannot be said that A1 had taken undue advantage or acted in cruel and unusual manner, the case was covered by Exception 4 of Section 300 of the IPC. Exception 4 of Section 300 provides that culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offenders having taken undue advantage or acted in cruel or unusual manner. It is immaterial in such cases, which party provocates or commits the first assault. The legal position is no more res integra that for applicability of Exception 4 all the ingredients mentioned therein must be found. It is not sufficient to show that there was a sudden quarrel and there was no premeditation, but it must further be shown that offender has not taken undue advantage or acted in a cruel or unusual manner.

20. There is long line of cases dealing with Exception 4 of Section 300 of the Indian Penal Code. Without multiplying the authorities, we refer to the recent decision of the Supreme Court in the case of Sachchey Lal Tiwari v. State of Uttar Pradesh, AI.R. 2004 S.C. 5039 wherein the Supreme Court observed thus:

> "9. The Fourth Exception of Section 300, IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the first exception, after which

its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reasons and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300, IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two or more persons whether with or without

weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'. These aspects have been highlighted in Dhirajbhai Gorakhbhai Nayak v. State of Gujrat 2003 (5) Supreme 223). When the factual scenario is considered in the legal principles indicated above, the inevitable conclusion is that Exception 4 to Section 300 IPC has no application to the facts of the case. The appeal filed by Sachchey Lal is without merit.
Now comes appeal filed by the State."

21. In the light of the aforesaid legal position, let us see whether all the four necessary ingredients for operation of Exception 4 of Section 300 is made out or not. Even if it be assumed that there was no premeditation and that it was chance encounter, we find that the evidence on record does not establish that the injuries on the person of Prashant by A1 were caused in sudden fight in the heat of passion upon a sudden quarrel. What is seen from the evidence is that the verbal altercation took place between A1 and the deceased and that continued for about 4 to 5 minutes. A1 then took out his knife and intended to stab the deceased, but at that time PW 2 and PW 3 pushed him aside. A1 and the deceased then moved towards Audi Pan Shop on the other side of the road. If because of

verbal altercation between A-1 and Prashant, passion ran high and A1 intended to stab him, the said incident was avoided by the intervention of PW 2 and PW 3. There was sufficient time then for passion to cool down as the incident of killing did not take place then and there, but occurred about 25-30 feet away on the other side of the road near Audi Pan Shop. The ingredient of sudden fight in the heat of passion in sudden quarrel, thus, is not established. Even if we assume that it was an act in a sudden fight in heat of passion and in a sudden quarrel then also we find that the manner in which A1 stabbed the deceased, it can be said without doubt that he acted in a cruel and unusual manner and also that he took undue advantage. It is not possible to accept the defence set up by A1 that the deceased was armed with knife. The defence that at the relevant time he alone was proceeding from side of Uma Talkies to Bindu chowk and at that time he was obstructed by PW 1 and his friends (including the deceased); that the deceased was armed with knife while PW 1 was having stick in his hand; that PW 1 and their friends stopped the scooter and the deceased gave a knife blow on his forehead with knife and PW 1 gave stick blows is untruthful and false. The deceased was unarmed and the number of injuries that were inflicted by A1 on the person of deceased leave no manner of doubt that A1 acted in cruel and unusual manner. It is established from the evidence on record

that A1 inflicted a knife blow on the abdomen of the deceased and when the deceased fell on the ground, then A1 inflicted 4 to 5 injuries on the person of the deceased. In the facts that have been proved by the prosecution, Exception 4 of Section 300 of the Indian Penal Code is not at all attracted.

22. The submission of the learned counsel for the accused A1 that he acted in exercise of his right of private defence is noted to be rejected. The deceased was unarmed. That PW 1 brought electric tubelight and bamboo in his hand could not lead to reasonable apprehension in the mind of A1 that PW 1 could cause serious harm to him and in that apprehension he inflicted knife blows on the person of Prashant. The plea of right of private defence has no merit.

23. We shall now deal with the submission of Mr.A.P.Mundargi, the learned counsel for the accused A2 that his conviction under Section 302 with the aid of Section 34 of the IPC is not legally sustainable.

24. We have already referred to the deposition of PW 1, PW 2 and PW 3 at quite some length and we need not repeat that. Suffice, however, to say that the following facts clearly emerge from their evidence:

(one) that A1 and A2 came together at site (two) A2 was armed with knife (three) A2 showed his knife and asked PW 2 and PW 3 to stand aside (four) throughout the incident A2 stood near A1 and (five) A2 went away along with A1 after the commission of crime. To find out whether the accused persons acted in furtherance of common intention, the conduct of the accused preceding the commission of offence, during the commission of offence and succeeding the commission of offence is relevant. The conduct of A2 and the facts that have emerged with regard to him and noticed by us leave no manner of doubt that A1 and A2 acted in furtherance of common intention to commit murder of Prashant. Number of knife blows were inflicted by A1 on the deceased. A2 was also armed with knife. A2 did not permit PW 2 and PW 3 to intervene and by show of knife ensured that PW 2 and PW 3 did not intervene. It is true that PW 1 did not specifically state in his evidence that A2 was armed with knife, but that does not affect the deposition of PW 3 which is reliable and in an attempt to snatch the knife from A2, PW 3 sustained injury on his finger. From the evidence that has come on record, it is difficult to hold that the accused persons shared the intention of causing only grievous hurt on the person of Prashant.

25. The decision of the Division Bench of this Court in

the case of Bhimashankar Siddannappa Thobade relied upon by the learned counsel for the accused A2 cannot be applied to the facts of the present case. That was a case where accused no.1 was armed with stick and accused nos. 2 and 3 were armed with a knife each. They attacked certain persons with whom they were on terms of hostility. During the affray accused no.3 stabbed in the chest of the person who had intervened and on his shouting that he was killed, all the accused ran away. The accused persons were convicted of an offence punishable under Section 307 read with Section 34 of the Indian Penal Code. However, on appeal, the Division Bench of this Court found that common intention of the accused was to cause grievous hurt to that person and that accused no. 3 exceeded the intention by inflicting an injury which would normally have resulted in the person's death. In the circumstances, the Division Bench held that since the grievous hurt was a part of the joint criminal act of the accused, accused nos. 1 and 2 could be convicted only under Section 326 read with Section 34, while accused no.3 could be convicted under Section 307 of the Indian Penal Code. We are afraid, the case that has been proved by the prosecution before us leaves no manner of doubt that murder of Prashant was a part of the joint criminal act of the accused persons and A2 was vicariously liable for the act of A1.

26. We, thus, find ourselves in agreement with the view of the learned Additional Sessions Judge, Kolhapur and affirm the conviction of the accused appellants for the offences punishable under Sections 302, 504, 506(2) read with Section 34 of the Indian Penal Code.

27. The appeals, accordingly, fail. The accused Kishor Eknath Nikam, the appellant in Criminal Appeal No.727/1999, is directed to surrender to the bail bond. His bail bond is cancelled.

(R.M. LODHA,J.)

(R.S. MOHITE,J.)